IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

JUAN CARRION-TORRES, Plaintiff v. COMMONWEALTH OF PUERTO RICO; DEPARTMENT OF CORRECTION AND REHABILITATION; NELSON MERCADO-FELICIANO, JESUS HERNANDEZ, HERIBERTO CHAMORRO Defendants	CIVIL 14-1543 (CCC)

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. PROCEDURAL BACKGROUND

Plaintiff inmate Juan Carrion-Torres has filed a pro-se complaint pursuant to the Civil Rights Act of 1967, 42 U.S.C. § 1983, claiming that his civil rights were violated by the defendants, and that as a result of that violation he seeks compensatory and punitive damages in the amount of $60,000[1]. (Docket No. 2 at 10). He alleges that from July 2013, he has been monitoring the recreational activities of the Maximum Security Institution in Ponce because the defendants have not been providing him with two hours of physical movement outside of his cell on Saturdays and Sundays and "parties days." As a result, he alleges a

[1]See Kuperman v. Wrenn, 645 F.3d 69, 73 n. 5 (1st Cir. 2011) (discussing the Prison Litigation Reform Act and limitations on recovery. 42 U.S.C. § 1997e(e)).

violation of the Morales Feliciano case[2]. (Docket No. 2 at 8). Co-defendants Hernandez and Chamorro are the institutional recreation leaders who are charged with failing to provide recreation as required under Morales-Feliciano[3], by failing to provide rotation of the necessary recreational officers which would apparently allow for active weekend recreation outside the cell. Nelson Mercado-Feliciano is the warden of the institution where plaintiff resides. Plaintiff makes reference to an agreement reached in that case on June 28, 2012 but which failed to be filed (archived). (Docket No. 2 at 8).[4] He alleges that these two officers, Hernandez and Chamorro, were ordered not to provide him with recreation outside his cell on weekends. Because this active recreation is part of the rehabilitation process, and he is being denied such activity, he seeks redress.

On October 6, 2014, defendants Commonwealth of Puerto Rico and the Department of Correction and Rehabilitation moved to dismiss the complaint for failure to state a claim upon which relief can be granted under Rule 12 (b)(6), Federal Rules of Civil Procedure. (Docket No. 16). They note that the conclusory allegations and contentions pled in the complaint, even if accepted as true, lack sufficient factual matter to state a claim for relief that is plausible on its face

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[2]Morales-Feliciano v. Rossello Gonzalez, Civil No. 79-4 (PJB).

[3]Over the years, the case has generally been referred to in this manner.

[4]A review of the Morales Feliciano docket reveals no docket entry on that date, nor any relevant docket entry near that date.

against them and thus the complaint does not satisfy the pleading standard of Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955 (2007).

The defendants also argue that they are entitled to Eleventh Amendment immunity, invoking the protection from suit by officials of government instrumentalities in their official capacity.

Plaintiff filed a response in opposition to the motion to dismiss on November 4, 2014. (Docket No. 17). He makes reference to an allegation by the defendants that he had a play station in his prison cell which he could use for recreation on weekends. He also refers to an unsatisfied judgment of a local court in his favor and in the amount of $10,000, "for the physical and psychological damages" related to an injury he apparently suffered while in custody[5]. Plaintiff generally notes in the response to the motion to dismiss that all defendants had knowledge of the serious injury that keeping him from two hours of outside exercise is producing, knowledge received as the result of this unsatisfied civil judgment against the Commonwealth of Puerto Rico. He stresses that an Eighth Amendment violation has been committed against him and that he has been exposed to serious harm and pain based upon the deliberate indifference of the

[5]Plaintiff has three civil actions pending in local courts, all against the Secretary of the Correctional Department, wardens, and correctional officers of different ranks. (Docket No. 2 at 3). These cases involve the same facts of the complaint or are otherwise related to plaintiff's imprisonment.

defendants. He also seeks the opportunity to amend the complaint and to be provided with appointed counsel.[6]

Since petitioner is proceeding pro se, I construe the complaint, however inartfully pleaded, under a less stringent standard that the one applied to lawyers. See Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197 (2007) (following Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285 (1976). "The policy behind affording *pro se* plaintiffs liberal interpretation is that if they present sufficient facts, the court may intuit the correct cause of action, even if it was imperfectly pled." Ahmed v. Rosenblatt, 118 F.3d 886, 890 (1st Cir. 1997); see Castro v. United States, 540 U.S. 375, 381, 124 S. Ct. 786 (2003) (noting that courts may construe *pro se* pleadings so as to avoid inappropriately stringent rules and unnecessary dismissals of claims). All well-pleaded factual averments made by a *pro se* plaintiff and reasonable inferences drawn therefrom must be accepted as true. Aulson v. Blanchard, 83 F.3d 1, 3 (1st Cir. 1996). While the pleadings are bare bone in nature, they provided a clear picture of the grievance plaintiff is bringing forth and the remedies he seeks, both injunctive relief and in punitive damages. It is also clear that the linchpin for this complaint is the case of Morales-Feliciano which has graced the court for over 35 years. See e.g. Morales Feliciano v. Rosello Gonzalez, 124 F. Supp. 2d 774, 779 (D.P.R. 2000); Morales

[6]Apparently, plaintiff has been moved to a maximum security facility in Guayama.

Feliciano v. Romero Barcelo, 672 F. Supp. 2d 591 (D.P.R. 1986); Caraballo-Cepeda v. Administracion de Correccion, 2013 WL 3802441 at * 3 (D.P.R. July 19, 2013); cf. Morales Feliciano v. Hernandez Colon, 775 F. Supp. 477, 482 (D.P.R. 1991); Morales Feliciano v. Hernandez Colon, 697 F. Supp. 37, 43 (D.P.R. 1988); Morales Feliciano v. Romero Barcelo, 672 F. Supp. 591, 597 (D.P.R. 1986); Feliciano v. Barcelo, 497 F. Supp. 14, 27 (D.P.R. 1979).

II. PLEADING A CAUSE OF ACTION UNDER 42 U.S.C. § 1983

Section 1983 creates a cause of action against those who, acting under color of state law, violate federal constitutional or statutory law. See 42 U.S.C. § 1983[7]; Parratt v. Taylor, 451 U.S. 527, 535, 101 S. Ct. 1908 (1981), overruled on other grounds by Daniels v. Williams, 474 U.S. 327, 330-31, 106 S. Ct. 662 (1986); Wilson v. Town of Mendon, 294 F.3d 1, 6 (1st Cir. 2002). In order for a defendant to be held liable under section 1983, his or her conduct must have caused the alleged constitutional or statutory deprivation. See Monell v. Dep't of Soc. Servs. of City New York, 436 U.S. 658, 692, 98 S. Ct. 2018 (1978); Soto v.

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[7] 42 U.S.C. § 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

Flores, 103 F.3d 1056, 1061-62 (1st Cir. 1997); Rodriguez-Sanchez v. Acevedo-Vila, 763 F. Supp. 2d 294, 301 (D.P.R. 2011). If Mr. Carrion-Torres's claim alleges a violation of federal constitutional law effected by state actors, his suit properly arises under section 1983. However, if it does not, then it cannot survive a Rule 12(b)(6) motion.

Federal Rule of Civil Procedure 12(b)(6) allows for the dismissal of an action for "failure to state a claim upon which relief can be granted[.]" Fed. R. Civ. P. 12(b)(6). Dismissal under the rule is appropriate where the plaintiff has failed to show its claim is at least "plausible." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557, 127 S. Ct. 1955. In ruling upon a Federal Rule of Civil Procedure 12(b)(6) motion, the court must accept as true all the well-pleaded factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiff. Perry v. New England Bus. Serv., Inc., 347 F.3d 343, 344 (1st Cir. 2003) (citing Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 16 (1st Cir. 1998)); Nazario-Baez v. Batista, 29 F. Supp. 3d 65, 69 (D.P.R. 2014); Gutierrez v. Molina, 447 F. Supp. 2d 168, 172 (D.P.R. 2006). Although "Twombly does not require heightened fact pleading of specifics . . . it does require enough facts to 'nudge [plaintiff's] claims across the line from conceivable to plausible.'" Quirós v. Muñoz, 670 F. Supp. 2d 130, 131 (D.P.R. 2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. at 570, 127 S. Ct. 1955). See Reyes-Garay v. Integrand

Assur. Co., 818 F. Supp. 2d 414, 424 (D.P.R. 2011); Vazquez Rivera v. Colon Ortiz, 2014 WL 7047943 at *2 (D.P.R. August 4, 2014). "Accordingly, in order to avoid dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" Maldonado-Concepción v. Puerto Rico, 683 F. Supp. 2d 174, 175-76 (D.P.R. 2010) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. at 555, 127 S. Ct. 1955); Rivera-Crespo v. Lopez, 2013 WL 1126977 at *1 (D.P.R. March 15, 2013). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. at 1949 (citing Bell Atl. Corp. v. Twombly, 550 U.S. at 555, 127 S. Ct. 1955); Arroyo-Perez v. Demir Group Intern., 733 F. Supp. 2d 322, 323 (D.P.R. 2010). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." Ashcroft v. Iqbal, 556 U.S. at 678, 129 S. Ct. 1937 (citing Bell Atl. Corp. v. Twombly, 550 U.S. at 556, 127 S. Ct. 1955). "Thus, any nonconclusory factual allegations in the complaint, accepted as true, must be sufficient to give the claim facial plausibility." Camacho-Torres v. Betancourt-Vázquez, 722 F. Supp. 2d at 154 (citing Ashcroft v. Iqbal, 556 U.S. at 679, 129 S. Ct. at 1950); Vazquez Rivera v. Colon Ortiz, 2014 WL 7047943 at *2 . "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged." Ortiz-Skerrett v. Rey Enter., Inc., 692 F. Supp. 2d 201, 203 (D.P.R. 2010) (quoting Ashcroft v. Iqbal, 556 U.S. at 678, 129 S. Ct. at 1949) (citing Bell Atl. Corp. v. Twombly, 550 U.S. at 556, 127 S. Sc. 1955)); Vazquez Rivera v. Colon Ortiz, 2014 WL 7047943 at *2.

Plaintiff's claim is clear. He demands the two hours of outdoor recreation on weekend days arguably afforded him by the case of Morales Feliciano, but also because it violates his right to rehabilitation and recreation. (Docket No. 2 at 9). Nevertheless, plaintiff receives exercise on weekdays and the failure to receive active weekend exercise with nothing more does not reach the level of constitutional consequences based upon the deprivation of a particular right of that level. See Sanchez Rodriguez v. Departamento de Correccion y Rehabilitacion, 537 F. Supp. 2d 295, 298 (D.P.R. 2008). Plaintiff does not plead an Eighth Amendment violation but rather asserts the same in the response to the motion to dismiss. But even in the light most favorable to the complaint, there is no facial plausibility that plaintiff has a federal cause of action based upon his being deprived of active recreation outside his cell on weekends. There is no constitutional right to rehabilitation in prison and no constitutional violation for being deprived of recreation two days out of seven. See Moody v. Daggett, 429 U.S. 78, 88 n. 9, 97 S. Ct. 274 (1976); Tapp v. Proto, 718 F. Supp. 2d 598, 620 (E. D. Pa. 2010); Zamboroski v. F. Rowe,

2013 WL 6491092 at *4 (W. D. Mich. December 10, 2013). There is no statutory violation and certainly there is no constitutional violation of a recognized right. See e.g. Torres Garcia v. Puerto Rico, 402 F. Supp. 2d 373, 383 (D.P.R. 2005); Carrasquillo-Oliveras v. Puerto Rico, 2010 WL 1485669 at 4 (D.P.R. April 9, 2010); Proverb v. O'Mara, 2009 WL 368617 at *16 (D. N. H. February 13, 2009), approved by Proverb v. Superintendent, HCDOC, 2009 WL 1292126 (D. N. H. May 6, 2009). Therefore plaintiff has failed to state a claim upon which relief can be granted under 42 U.S.C. § 1983.

III. SOVEREIGN IMMUNITY

The Eleventh Amendment states:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

The Eleventh Amendment applies not only to states but also to state agencies acting as "alter egos" to the state. See Ainsworth Aristocrat Int'l Party v. Tourism Co. of the Commonwealth of P.R., 818 F.2d 1034, 1036 n.2 (1st Cir. 1987) (quoting Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280, 97 S. Ct. 568 (1977)). Similarly, the Eleventh Amendment extends not only to state agencies acting as alter egos to the state but also to

state employees exercising their official duties. "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." Will v. Mich. Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304 (1989); Cosme-Perez v. Mun. of Juana Diaz, 585 F. Supp. 2d 229, 236 (D.P.R. 2008).

For the purposes of the Eleventh Amendment, Puerto Rico is afforded the same rights as a state and therefore any private suit against the Commonwealth of Puerto Rico is barred. See Sancho v. Yabucoa Sugar Co., 306 U.S. 505, 506, 59 S. Ct. 626 (1939); Porto Rico v. Rosaly y Castillo, 227 U.S. 270, 273-74, 33 S. Ct. 352 (1913); see, e.g. Jusino-Mercado v. Commonwealth of P.R., 214 F.3d 34, 37 (1st Cir. 2000); Ezratty v. Commonwealth of P.R., 648 F.2d 770, 776 n.7 (1st Cir. 1981) (explicitly stating that Eleventh Amendment immunity applies to Puerto Rico).

The Puerto Rico government can be sued if it has consented to be sued by statute or if the right has been waived by Congress. Ramírez v. P.R. Fire Serv., 715 F.2d 694, 697 (1st Cir. 1983). Consequently, "[t]he eleventh amendment bars the recovery of damages in a federal court against the Commonwealth of Puerto Rico, e.g., Ramírez v. Puerto Rico Fire Service, 715 F.2d 694, 697 (1st Cir. 1983), and, by the same token, it bars the recovery of

damages in *official capacity* suits brought against Puerto Rico officials where recovery will come from the public fisc." Culebras Enter. Corp. v. Rivera Ríos, 813 F.2d 506, 516 (1st Cir. 1987) (citing Kentucky v. Graham, 473 U.S. 159, 165-66, 105 S. Ct. 3099 (1985)).

Petitioner has presented a terse statement as to how his rights have been violated but gives no supporting facts except that he has been denied the right to exercise on weekends as acquired under Morales-Feliciano, and that he suffered unspecified damages. The right is specifically active weekend recreation in the prison he is (or was) living in. Under the most liberal pleading focal lens, the issue does not reach the protection of the United States Constitution, nor of any of its amendments.

IV. CONCLUSION

Plaintiff has failed to state a claim upon which relief can be granted. The complaint lacks any specificity as to the moving co-defendants Commonwealth of Puerto Rico and the Department of Correction and Rehabilitation. Even if the court considers all reasonable inferences in favor of the plaintiff, a maximum security inmate[8], there is still no identifiable cause of action upon which relief can be granted. This is not a case of inartfully composed pleadings. This is a case of supposed injuries which plaintiff can clearly outline, (caused by

[8]As an aside, plaintiff has been classified a career offender in this court.

the defendants), but which he has chosen not to, injuries somehow caused by not being allowed to exercise outside his cell on weekends. Indeed, he expects a money judgment to be satisfied in his favor and has three similar cases pending in local court. But there is no concrete allegation against the moving defendants in any event. In a nutshell, the complaint does not present sufficient facts from which the court may intuit the correct cause of action, particularly one relying on the Eighth Amendment. See e.g. Lopez-Jimenez v. Pereira, 2010 WL 500504 at 4 (D.P.R. February 3, 2010); cf. Rivera-Crespo v. Molina-Rodriguez, 2009 WL 2411566 at *2 (D.P.R. July 31, 2009).

Accordingly, I recommend that the complaint be dismissed for failing to state a claim upon which relief might be granted, and based upon the defense of sovereign immunity.

Under the provisions of Rule 72(d), Local Rules, District of Puerto Rico, any party who objects to this report and recommendation must file a written objection thereto with the Clerk of this Court within fourteen (14) days of the party's receipt of this report and recommendation. The written objections must specifically identify the portion of the recommendation, or report to which objection is made and the basis for such objections. Failure to comply with this rule precludes further appellate review. See Thomas v. Arn, 474 U.S. 140, 155, 106 S. Ct. 466 (1985); Sch. Union No. 37 v. United Nat'l Ins. Co., 617

F.3d 554, 564 (1st Cir. 2010); Davet v. Maccorone, 973 F.2d 22, 30-31 (1st Cir. 1992); Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985 (1st Cir. 1988); Borden v. Sec'y of Health & Human Servs., 836 F.2d 4, 6 (1st Cir. 1987); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982.

At San Juan, Puerto Rico, this 22d day of April, 2015.

S/ JUSTO ARENAS
United States Magistrate Judge